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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JEWEL RICHARD BROWDER, *Petitioner*

v.

CYRUS R. VANCE, Secretary of the Army, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jewel Richard Browder, the petitioner herein, by his attorneys, prays that a writ of certiorari issue to review the decision of the United States District Court of Appeals for the District of Columbia entered in the above cause on

September 20, 1963, refusing to allow petitioner herein an appeal from the judgment of the United States District Court for the District of Columbia, dated September 10, 1963, denying petitioner's motion for a three-judge court.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia denying the application of the petitioner for permission to take an appeal is not yet reported, but is appended hereto (Appendix A, p. 1a).

The memorandum and interlocutory orders of the United States District Court for the District of Columbia are not yet officially reported, but are appended hereto (Appendix B, pp. 2a-5a and Appendix C, pp. 6a-7a).

The temporary restraining order of the United States District Court for the District of Columbia is not yet officially reported, but is appended hereto (Appendix D, pp. 8a-10a).

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered on September 20, 1963.

The temporary restraining order of the United States District Court was issued on August 30, 1963.

The interlocutory orders of the United States District Court for the District of Columbia were entered on September 10, and September 13, 1963.

The order of the Chief Justice of the United States restraining the defendants and granting petitioner thirty days in which to file this petition for certiorari was entered on September 30, 1963.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Should the Court of Appeals have granted petitioner's application for an interlocutory appeal under the provisions of Section 1292(b) of Title 28, United States Code?

2. Is a three-judge court necessary to hear petitioner's motion for a preliminary and permanent injunction?

3. Does a substantial question of constitutional validity arise from the language of Sections 3791 et seq. of Title 10, United States Code?

4. Assuming that a substantial question of constitutional validity does thus arise, is the Statute itself unconstitutional on its face?

STATUTES INVOLVED

The Statutes involved are:

United States Constitution
Amendments, Article V

United States Code:

5 U.S.C. 1006(e)
10 U.S.C. Chapter 360
10 U.S.C. Sections 3791 through 3797
28 U.S.C. Section 1254(1)
28 U.S.C. Section 1292(b)
28 U.S.C. Section 2282
28 U.S.C. Section 2284

The pertinent portions are either quoted in the text or set forth in Appendix G, pp.

STATEMENT

The petitioner is a Lieutenant Colonel in the Regular Army of the United States. He was ordered to be eliminated by involuntary retirement from the active list of the Regular Army by the defendant, Secretary of the Army, under the provisions of Section 3791 et seq. of Title 10, United States Code, on the grounds of moral dereliction.

The order was to be effective on August 31, 1963, but has been stayed pending appeal.

On January 26, 1962, the petitioner was acquitted by a General Court Martial of certain charges and specifications, which are appended hereto in the General Court Martial Order as Appendix E, pp. 14a-18a. Nevertheless, and not withstanding the said acquittal on all charges and specifications, the petitioner was advised that he would be required to show cause before a Board of General Officers, convened according to Title 10, U.S.C. 3791 et seq., why he should not be removed from the active list of the Regular Army on certain charges (Appendix F, pp. 19a-21a), arising out of the same investigations, reports and information upon which the charges and specifications, of which he was acquitted by the General Court Martial, were based.

The Board of Inquiry held a hearing on December 10-11, 1962, at which time petitioner was represented by counsel who protested the unconstitutionality of the Board and its proceedings. Prior to the hearing petitioner requested that some thirty witnesses, upon whose unsworn statements the Government's case was largely grounded, be called in order that they might be examined and confronted by the petitioner. Petitioner was advised that the Government refused to call twenty-two of the said witnesses, but would provide local transportation for the remaining if the defense made the necessary arrangements for their attendance.

The Board found that the petitioner had shown cause for retention as to the allegations of acts of personal misconduct and of conduct unbecoming an officer, but the Board found that the petitioner had not shown cause as to the allegation of intentional omission or misstatements of fact in official statements and records for the purpose of misrepresentation, and recommended that he be removed from the active list of the Regular Army basing its finding and recommendation on the following reasons and factual data:

(a) Unlawfully obtained payment of Basic Allowance for Quarters from Sept 1957 to about April 1960 during which period he was occupying adequate government family type quarters.

(b) On or about 24 Aug 1959 unlawfully caused travel orders to be issued for travel to Utica, N. Y. which orders were for his own personal benefit to permit collection of travel expenses from the government.

(c) On or about Nov 1959 on submission of a voucher received payment from the U. S. for a trip from Burlington, Iowa, to Joliet, Ill. the primary purpose of which was personal rather than official in nature.

(d) Submitted a travel voucher for TDY in Paris and Munich during the period 26 Aug to 8 Oct 1960 when travel to these cities was not authorized in his orders.

Two of the "reasons and factual data" repeat the same facts as are stated in the said General Court Martial Order No. 5, dated April 12, 1962, (Appendix E, pp. 11a-18a) as follows:

> Reason (a) above was covered by Specifications 1 through 19 of Charge I, of which charge and specifications the petitioner was acquitted.
>
> Reason (b) above was covered by Specification 2 of Charge II and by Specification 3 of Charge III, of which charges and specifications the petitioner was acquitted.

These findings were approved by the Army Board of Review for Elimination and by the Secretary of the Army who ordered the petitioner's involuntary retirement under the provisions of 10 U.S.C. 3791 et seq.

On August 29, 1963, petitioner filed his complaint, his motion for a preliminary injunction, and his motion for a

three-judge court, in the United States District Court for the District of Columbia, alleging that the statutes (10 U.S.C. 3791 et seq.), upon which his removal is predicated, are unconstitutional, in that they deprive an officer of the Regular Army of his office, his pay, allowances and perquisites thereunto belonging, without due process of law; in violation of the Fifth Amendment to the Constitution of the United States, in that the said sections provide for the elimination of an officer of the Regular Army from the Service for moral dereliction without any provision for confrontation or cross-examination of those persons making the derogatory accusations, and that, as construed and applied to the petitioner under the circumstances in the present case, the said sections are unconstitutional for the same reasons.

On August 30, 1963, the United States District Court for the District of Columbia, Judge Leonard P. Walsh, entered a temporary restraining order which stayed the removal of the petitioner in order to prevent irreparable injury to him, pending determination of the constitutional questions involved and in order to grant the petitioner a hearing on his motion to convene a three-judge court (Appendix D, pp. 8a-10a).

On Tuesday, September 3, 1963, and on Friday, September 6, 1963, Judge Walsh heard argument on petitioner's motion for a three-judge court and on defendants' motion to dismiss the complaint.

On September 10, 1963, Judge Walsh issued a memorandum and order, (Appendix B, pp. 2a-5a), (1) denying petitioner's motion to convene a three-judge court, (2) denying defendants' motion to dismiss, and (3) continuing the temporary restraining order in effect until 12:30 P.M., September 12, 1963.

On September 12, 1963, petitioner filed a motion in the United States District Court for a stay to permit him to file an application for permission to appeal in the United

States Court of Appeals for the District of Columbia. On that date, Judge Walsh issued an order (Appendix C, pp. 6a-7a), continuing the temporary restraining order until September 19, 1963, and stating therein that it was the finding of the United States District Court that the order appealed from (Appendix B, pp. 2a-5a) involved a controlling question of law as to which there is a substantial ground for difference of opinion "to wit: That there is not a substantial question of constitutional validity arising from the language of the statute itself (10 U.S.C. 3791, et seq.)"; and that an immediate appeal from the said order may materially advance the ultimate termination of this litigation.

On September 16, 1963, under the provisions of Section 1292(b) of Title 28 U.S.C. and Rule 9(b) of the Rules of the Court of Appeals for the District of Columbia, petitioner filed his motion for permission to take an appeal of the said interlocutory order and for a stay in the United States Court of Appeals for the District of Columbia Circuit.

On September 20, 1963, the United States Court of Appeals for the District of Columbia Circuit denied the said application in a per curiam opinion, (Appendix A, p. 1a), in which Judge Wright dissented as follows:

> "I would grant the motion for interlocutory appeal and extend the stay. The attack on the constitutionality of the statute is not plainly frivolous.[1] Consequently a three-judge district court is required. 28 U.S.C. §2282. Compare *Bailey* v. *Patterson*, 369 U.S. 31 (1962). See *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962), for authority of this court to entertain the appeal under the circumstances of this case.

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[1] See *Beard* v. *Stahr*, 370 U.S. 41 (1962), in which the Court avoided ruling on the constitutionality of the statute in suit on the grounds urged here. See also in that case the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black, with respect to the *constitutionality* of this statute."

The temporary restraining order issued by the District Court expired on September 19, 1963. On September 24, 1963, the Department of the Army issued a further order involuntarily retiring the petitioner from the active list of the Regular Army on September 30, 1963, and placing him on the retired list as of October 1, 1963. This order was stayed by the order of Chief Justice Warren, dated September 30, 1963.

REASONS FOR GRANTING OF WRIT

The questions presented will be considered *seriatim:*

A. The Court of Appeals Should Have Granted Petitioner's Application for an Interlocutory Appeal

Section 1292(b) of Title 28 United States Code provides:

> "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Rule 9½ of the General Rules of the United States Court of Appeals for the District of Columbia provides:

> "Applications for permission to take appeals under Section 1292(b) of Title 28, United States Code, from interlocutory orders of a District Court shall set forth the relevant facts, including the nature and a brief history of the proceedings in the District Court with all important dates; shall include or have annexed a

> copy of the order from which an appeal is sought to be taken, together with any findings of fact, conclusions of law and opinion of the District Court relating thereto; and shall state briefly the controlling question of law which the order is believed to involve, the ground for difference of opinion with respect thereto which is believed to be substantial, and the basis for believing that an immediate appeal may materially advance the ultimate termination of the litigation."

Under the cited provisions of the Statute, the District Court Judge stated in his Order of September 12, 1963, that it was "the opinion of this Court that the said Order appealed from involves a controlling question of law as to which there is a substantial ground for difference of opinion, to wit, 'That there is not a substantial question of constitutional validity arising from the language of the Statute itself (10 U.S.C. 3791, et seq.)' and that an immediate appeal from the said order may materially advance the ultimate termination of this litigation * * * "

While it is in the discretion of the Court of Appeals to permit an appeal of an interlocutory question to be taken from the said Order, the interlocutory appeal should be allowed unless it is plainly frivolous. Certainly the question raised, here on appeal is not insubstantial. (*Schneider* v. *Rusk*, U.S. ; 83 S.Ct. 621). Furthermore, no prior decisions of this Court have rendered the petitioner's position frivolous. (*Bailey* v. *Patterson*, 369 U.S. 31; 82 S.Ct. 549). This Court did not decide the constitutional question in the *Beard* case (370 U.S. 41; 82 S.Ct. 1105), but it can be argued that, in the absence of such a decision, by vacating and remanding the judgment of the three-judge District Court, which held the statute to be constitutional, this Court has in effect held that the question of the constitutional validity of the statute (10 U.S. 3791 et seq.) remained open for later consideration.

Therefore, the Court of Appeals should have granted petitioner's application for an appeal to consider this interlocutory question.

B. A Three Judge Court Is Necessary To Hear Petitioner's Motion for a Preliminary and Permanent Injunction

Section 2282 of Title 28, United States Code, provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, Section 1, 62 Stat. 968.)

Section 2284 of Title 28, United States Code, provides:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The District judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> (2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.
>
> If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.
>
> Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State. (June 25, 1948, ch. 646, Section 1, 62 Stat. 968.)

Let us examine the relevant facts of this case under the rule of this Court (*Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U.S. 711; 82 S.Ct. 1294) that when an

application for a statutory three-judge court is addressed to a District Court, the Court's inquiry is appropriately limited to determining (1) whether the constitutional question raised is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief and; (3) whether the case presented otherwise comes within the requirements of the three-judge statute.

1. The Constitutional Question Raised Is Substantial:

Paragraph 20 of the complaint alleges that Sections 3791-3797 of Title 10, U.S.C., as amended in 1960, are unconstitutional on their face because they provide for separation of an officer from the Army on the grounds of moral dereliction without making any provision for compulsory process to enable the said officer to confront and to cross-examine his accusers, in violation of the due process clause of the Fifth Amendment.

In paragraph 21 of the complaint, Plaintiff repeats the allegation of unconstitutionality as the statute was construed and applied to him in the circumstances of the present case; because he was, in fact, denied confrontation with his accusers because the tribunal lacked subpoena powers to require said accusers to appear before it and denied Plaintiff's request that the accusers be called as his witnesses.

In paragraph 27(c) of the complaint Plaintiff prays that defendants be enjoined from executing and enforcing Sections 3791-3797, Title 10 U.S.C., on the ground of their repugnance to the Constitution.

In his motion for preliminary injunction, Plaintiff prays for such an injunction in respect of the said prayer in paragraph 27(c) of the complaint.

Thus, the Relief sought in paragraph 27(c) of the complaint would restrain the operation of Title 10 U.S.C. 3791 et seq. in other cases, and, therefore, requires a three-judge

court under the rule set forth in *Fleming* v. *Nestor* (363 U.S. 603, 80 S.Ct. 1367) to the effect that the act does not require a three-judge court where the relief sought would not restrain the operation of the statute in other cases.

The U. S. District Court (Judge Walsh) has in its Order of September 12, 1963, stated that there is not a substantial question of constitutional validity arising from the language of the Statute itself, (10 U.S.C. 3791 et seq.) thereby failing to follow the "rule of the case" in the said court, which rule was established by Judge Holtzoff in the prior case of *Beard* v. *Stahr* (200 F. Supp. 766) and which stated in effect that the constitutional question raised under the said statute was substantial.

Here the basic constitutional question is: Can the Secretary of the Army under the provisions of 10 U.S.C. 3791 et seq. order the involuntary retirement of a Regular Army Officer from the Regular Army by violating the rights of said Regular Army Officer under the Fifth Amendment to the Constitution of the U. S.

The *Beard* case (370 U.S. 41; 82 S.Ct. 1105) came to this Court and was disposed of on other grounds, but the question of the appointment of the three-judge court was neither raised nor discussed by this Court. It must, therefore, be assumed that this Court acquiesced in the granting of the petition for a three-judge court and, therefore, in the grounds therefor, namely, that a substantial constitutional question had been raised.

It is submitted, therefore, that a substantial constitutional question is raised herein.

2. The Complaint Formally Alleges a Basis for Equitable Relief:

Paragraphs 16, 19, 22, 23, 25 and 26 of the Complaint allege as follows:

"16. The hearing before the Board of Inquiry was not 'fair and impartial' as required by said Section 3792 (b) of Title 10, U. S. Code, in the following particulars:

"a. The hearing was unfair because plaintiff was deprived of the right to be confronted by and to cross-examine the witnesses against him.

"b. The hearing was unfair because conducted under regulations that shifted the burden of proof to the respondent officer, the plaintiff here, the said regulations gave probative and well-nigh conclusive effect to the *ex parte* allegations drawn by the selection board from a file of papers.

"c. The hearing violated plaintiff's constitutional right not to be twice placed in jeopardy for the same offense, after he had been acquitted by a court martial of the same offenses considered by the Board of Inquiry.

• • •

"19. Section 3791 to 3797, inclusive, of Title 10, U. S. Code, are unconstitutional on their face, because they deprive plaintiff of his office and of the pay, allowances, and perquisites thereunto appertaining, without due process of law, in violation of the Fifth Amendment, in that they provide for separation from the service for derogatory reasons without any facilities for confrontation by and cross-examination of those making the derogatory accusations.

• • •

"20. As construed and applied to the plaintiff in the circumstances of the present case, said Sections 3791 to 3797, inclusive, of Title 10, U. S. Code, are unconstitutional for the same reasons.

"22. Nevertheless, on the basis of said elimination proceedings, the defendants imminently threaten to,

and unless restrained and enjoined by this Court will, irrevocably separate plaintiff from the active list of the Regular Army on August 31, 1963, to his irreparable injury, branded for life as a person unworthy of trust or confidence and permanently stigmatized with moral dereliction without being confronted by his accusers. Plaintiff has now completed more than 24 years of active duty and, if once removed from the active list of the Regular Army, cannot be restored thereto under existing law, nor by executive action, but could only be restored thereto by the enactment of a special Act of Congress authorizing his reappointment and by executive reappointment pursuant to such special legislation. The stigma about to be attached to him by the action of the five defendants will follow him, whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right to confront his accusers as he would have in a criminal trial, and as he did have before the court martial which acquitted him.

"23. Plaintiff could not be made even monetarily whole except by bringing a succession of suits in the Court of Claims, and therefore does not have a speedy, prompt, or adequate remedy at law. Furthermore, plaintiff is an engineer by profession. Prior to the court martial at which he was acquitted, he served for 1½ years as the Commanding Officer, Ordnance Test Activity, Yuma Test Station, Yuma, Arizona, and as the Commanding Officer, Iowa Ordnance Plant, for 2½ years, both of these assignments requiring Top Secret Restricted Data security clearance. Before the said clearance could be restored to plaintiff after his acquittal by the court martial, the board proceedings were begun, and his security clearance has not yet been restored. In the type of work which he would be qualified to perform after separation from service, he would require a high security clearance which the action of the Under Secretary would permanently deny to him.

* * *

"25. Plaintiff has exhausted all of his administrative remedies. Any appeal to the Secretary of the

Army or his delegate from this order would be only a matter of grace and therefore not an administrative remedy. Any appeal to the Secretary of the Army or his delegate would moreover be fruitless since the Statute (Title 10, U. S. Code, Sec. 3794) provides that action by the Secretary is final and conclusive.'

"26. Plaintiff accordingly has no adequate relief save through this action, and the balance of convenience requires that the *status quo* be maintained during its pendency."

If declaratory relief can be accorded, as it certainly could be (*Bland* v. *Connally*, 110 U. S. App. D.C. 375, 293, F. 2d 852), this action for an injunction is timely to prevent an injustice. It must be conceded that any retirement for moral dereliction is characterized as less than honorable and will result in serious injury. As recently stated: "It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment." (*Bland* v. *Connally*, *ibid*)

It is apparent, therefore, that the complaint thus formally alleges a basis for equitable relief.

3. The Case Presented Otherwise Comes Within the Requirements of the Three Judge Statute:

Subparagraph (1) of 28 U.S.C. 2284 is not applicable to the facts herein since the motion for a three-judge court has been denied.

Under subparagraph (2) of 28 USC 2284, the United States Attorney had more than five days notice of the hearing on the motion for a three judge court. The complaint and motion for a three judge court were filed on August 29, 1963, and the argument on the motion for a three judge court was heard on September 6, 1963.

Under the provisions of subparagraph (3) of 28 USC 2284, Judge Walsh, the district judge to whom application

was made, on August 30, 1963, granted a temporary restraining order (Appendix D, pp. 8a-10a) to prevent irreparable damage to the petitioner, and this order was continued in effect until September 19, 1963, the date of the hearing before the U.S. Court of Appeals. The said order of Judge Walsh contained a specific finding that specified irreparable damage, i.e. loss of his permanent and temporary commissions, and his pay and allowances pertaining thereto, would result if the said temporary restraining order was not granted.

The provisions of subparagraphs (4) and (5) do not apply since the motion for a three judge court was denied.

It is thus apparent that this case otherwise comes within the pertinent requirements of the three judge statute.

Plainly, therefore, Plaintiff in seeking a preliminary injunction to restrain the enforcement and operation of an Act of Congress on the ground of repugnance to the Constitution must proceed under the provisions of the cited statute which require a three judge court. The rule of *Fleming* v. *Nestor* (363 US 603; 80 S.Ct. 1367) concerning the applicability of 28 USC 2282 which states that Section 2282 "does not provide for a case where the validity of an act of Congress is merely drawn in question" is not applicable under the facts of this case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress.

In conclusion, therefore, a three judge court is necessary to hear petitioner's motion for a preliminary and permanent injunction.

C. Substantial Questions of Constitutional Validity Arises from the Language of 10 U.S.C. 3791 et seq.

Article V of the Amendments to the Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Chapter 360 of Title 10, U.S.C. entitled, "Separation from Regular Army for Moral or Profession Dereliction or in Interests of National Security", provides in pertinent sections as follows:

Section 3791 authorizes the Secretary of the Army to convene Selection Boards "to review the record of any commissioned officer on the active list of the regular army to determine whether he shall be required, *because of moral dereliction*, * * * to show cause for his retention on the active list."

On its face this section violates the above section of the Constitution as follows:

1. The words "*moral dereliction*" are left undefined. If given their ordinary connotation they mean a neglect or failure in duty (Webster's New World Dictionary p. 395) of making the distinction between right and wrong in conduct (Ibid p. 956); we have been unable to discover any meaning in common law for these words. However, if given their military connotation, as stated in paragraph 4 of AR 635-105 they apparently mean conduct within the control of the individual concerned which tends to bring the individual or the army into disrepute. Specifically they mean the following acts:

"(1) Discreditable intentional failure to meet personal financial obligations.

(2) Mismanagement of personal affairs detrimentally affecting the performance of duty of the officer concerned.

(3) Mismanagement of personal affairs to the discredit of the service.

(4) Intentional omission or misstatement of fact in official statements or records, for the purpose of misrepresentation.

(5) Acts of intemperance and/or personal misconduct.

(6) Commission or attempted commission of a homosexual act or existence of homosexual tendencies. See AR 635-89.

(7) Intentional neglect of or failure to perform duties.

(8) Conduct unbecoming an officer.

(9) Acts or behavior not clearly consistent with the interests of national security (see AR 604-10 and par. 2b, app. I).

Thus the Army, because the words have not been defined in the Statute and because their meaning is uncertain in law, has given its own definition of what is "moral dereliction", which is certainly not the commonly accepted sense of the words.

It would, therefore, appear that this section of the statute is void for uncertainty.

2. The requirement "to show cause" compels the officer to be a witness against himself, a violation of the above section of the Constitution "not to be compelled to be a witness against himself". As the Supreme Court said in *Counselman* v. *Hitchcock* (142 U.S. 547):

> "It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. *It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. The object was to assure that a person should not be compelled, when acting as a witness in any investigation, to give*

testimony which would tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. (Counselman v. Hitchcock 142 U.S. 547.)" (Italics added)

Thus, in compelling an officer to be a witness against himself the statute violates the above section of the Constitution.

Section 3792 provides as follows:

"Boards of Inquiry — Composition — Duties — (a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under Section 3791 of this title, shall be retained on the active list of the Regular Army.

"(b) A fair and impartial hearing before a board of injuiry shall be given to each officer so required to show cause for retention.

"(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review. * * *"

This section is unconstitutional on its face in that it prescribes "a fair and impartial hearing" without defining what is a "fair and impartial hearing", or without prescribing any standard by which a "fair and impartial hearing" may be judged. The question immediately arises: Is this a fair and impartial hearing as established by the Congress under the Administrative Procedures Act which provides in Section 7(c) 5 U.S. 1006 (c) as follows:

"(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or un-

duly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

or is it a fair and impartial hearing under the provisions of AR 635-105, as changed, which provides in pertinent part in paragraph 10, Appendix I, as follows:

"* * * The instructions will include, * * *:

a. *Informing the board members that selection of an officer to show cause for retention is a "prima facie" case for elimination in the absence of convincing evidence advanced by the respondent for further service;* and, that the adverse findings of the selection board, standing alone, is sufficient to support elimination. (Italics added)

b. *Emphasizing that the burden of proof rests with the respondent to show why he should retain his present status."* (Italics added)

It will thus appear that the failure of the Congress to define the words "fair and impartial hearing" make this section void for uncertainty.

This Section is also unconstitutional on its face because it contains the words "*the officer has failed to establish that he should be retained on the active list*", which words shift the burden of proof to the officer concerned in violation of due process of law. Due process requires that the burden of proof be upon the proponent of the order. This means that the party initiating the proceeding has the

general burden of coming forward with a prima facie case, but here the Army by its own *fiat* says that its "*in camera*" findings of the Selection Board constitute a prima facie case, and unless rebutted, are sufficient to support elimination. Thus the Army violates the due process clause and by its violation attempts to pass the burden of proof to the respondent.

The Chapter is unconstitutional on its face because it does not grant subpoena powers to call witnesses, but it does give the Secretary the power to dismiss an officer of the Regular Army for moral dereliction without giving him the right of confrontation.

In the dissenting opinion in the *Beard* case (370 U.S. 41; 82 S.Ct. 1105), Mr. Justice Douglas, with whom Mr. Justice Black concurred, stated in pertinent part:

> "Dismissal is one thing; dismissal with stigma, as here, is quite another. Dismissal with stigma is a severe penalty. In comparable situations, the Government has been required to carry the burden of proof. Kwong Hai Chew v. Rogers, 103 U.S. App. D.C. 228, 257 F. 2d 606; Wood v. Hoy, 9 Cir., 266 F. 2d 825, 830. Unless this burden is meticulously maintained, discharge for race, for religion, for political opinion, or for beliefs may masquerade under unproved charges. This right, like the right to be heard, is basic to our society. Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L. Ed. 817 (concurring opinion); Beilan v. Board of Public Education, 357 U.S. 399, 421-423, 78 S.Ct. 1317, 1330-1331, 2 L. Ed. 2d 1414 (dissenting opinion); Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L. Ed. 216."
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> "* * * Confrontation and cross-examination are, as I understand the law, vital when one's employment rights are involved (see Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L. Ed. 2d 1377). * * * Faceless informers are often effective if they need not take the stand. A fair hearing requires the production of the accuser so that cross-examination can test his character and reliability."

Here the petitioner will be retired with the stigma of moral dereliction, a severe penalty. Before the Board the Government was not required to carry the burden of proof and, therefore, the Board found for elimination. However, before the Court Martial the Government was required to carry the burden of proof and the petitioner was acquitted (See Appendix E, pp. 11a-18a). Before the Board the petitioner was denied confrontation and cross-examination of the "faceless informers" who were his accusers. But in the Court Martial the right of cross-examination and confrontation was not denied him, and petitioner was acquitted.

Before the Board petitioner was denied a "fair hearing" which requires the production of the informers and which requires the party initiating the proceeding to come forward with a *prima facie* case. At the Court Martial, the Government through its witnesses presented its *prima facie* case and the petitioner was acquitted.

The action of the Board, in violation of the constitutional rights of the petitioner, should not be permitted to render his acquittal by a general court martial a nullity.

The present case is ripe for review. As soon as the Secretary of the Army again orders the involuntary retirement of the petitioner, he will be severed from the Regular Army with less than an honorable retirement. At stake is a man's professional standing, his character, and his claim to an honorable retirement. "Where the Army departs from the statutory standard which prescribes the basis on which discharges will be issued, the federal courts can intervene." (See *Harmon* v. *Brucker*, 355 U.S. 579, 78 S. Ct. 433, 2 L. Ed. 503.)

From the above it can readily be seen that substantial questions of constitutional validity arise from the language of the Statute itself.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the decision of the Court of Appeals for the District of Columbia, or, in the alternative, to rule upon the interlocutory order issued by the United States District Court for the District of Columbia, and if said ruling finds that a substantial question of constitutional validity arises from the language of the statute, (10 U.S.C. 3791 et seq.) itself, to rule upon the constitutionality of the said statute.

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